



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 21, 1998

Ms. Elizabeth G. Neally
Roerig, Oliveira & Fisher, L.L.P.
855 West Price Road, Suite 9
Brownsville, Texas 78520-8786

OR98-3214

Dear Ms. Neally:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 120528.

The Los Fresnos Independent School District (the "school district"), which your office represents, received a request for a "[c]opy of Blue Cross & Blue Shield [sic] Insurance Proposal submitted during recent Request for Proposal process." In response to the request, you submit to this office for review the records which you assert are responsive. You state that "we need to know whether or not the information requested falls within the exception under Section 552.104 of the Texas Open Records Act." We have considered the exception and issues raised and reviewed the submitted information.

We will first address your assertion that the requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." This exception to disclosure protects a governmental body's interest, does not make information "confidential," and may be waived by a governmental body. Open Records Decision No. 592 at 8 (1991). The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract.¹ Open Records Decision No. 593 at 2 (1991).

¹Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. See Open Records Decision No. 592 (1991).

Although governmental bodies that properly raise this exception may withhold bidding information while the governmental officials are in the process of evaluating the proposals, section 552.104 does not generally except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982), 184 (1978). We note that, although you raised section 552.104, you did not explain how this exception applies to the requested information. *See* Gov't Code § 552.301(b)(1). Generally, if a governmental body does not establish how and why an exception applies to the requested information, the attorney general has no basis on which to pronounce it protected. *See* Open Records Decision No. 363 (1983).

A governmental body must submit written comments, within fifteen days of receiving the request, explaining the reasons why a stated exception applies to the requested information. *See* Gov't Code § 552.301(a), (b)(1). Furthermore, the Open Records Act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Based on the school district's failure to offer any support for the section 552.104 exception, we find that the school district has not sustained its section 552.104 claim and may not withhold any of the requested information under this exception.

In addition to section 552.104, you also assert that "[i]t is Blue Cross and Blue Shield's position that the insurance proposal is exempt from disclosure."² Although you have not raised any other applicable exception, based on the records at issue, we must consider whether some of the submitted information should be excepted from required public disclosure under section 552.110 of the Government Code. The Office of the Attorney General will raise section 552.110 on behalf of a governmental body when necessary to protect third-party interests. *See generally* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified Blue Cross Blue Shield of Texas, Inc. ("Blue Cross") about the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the

²In support of this assertion, you reference "a specific paragraph contained within the proposal that says 'this proposal, in whole or in part, may not be reproduced, copied, published, or released to third parties without the prior written approval of Blue Cross and Blue Shield of Texas, Inc.'"

requested information. Blue Cross did not respond to our notification. Therefore, we have no basis to conclude the information about these Blue Cross is excepted from required public disclosure. However, among the information submitted by Blue Cross, we found a notation in their proposal, which contends that the "proposal is the proprietary and confidential information of Blue Cross,"³ therefore, we will next consider whether any of the information at issue is excepted from disclosure under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided by Blue Cross. See Open Records Decision No. 363 (1983) (third-party duty to establish how and why exception protects particular information). Therefore, the requested information, concerning Blue Cross, is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes "commercial or financial information." Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted). Neither the school district nor Blue Cross, whose proprietary interests are implicated by this request, have established that releasing the requested information would likely cause them to suffer substantial competitive injury. Therefore, we conclude that the requested information, concerning Blue Cross, is not excepted from disclosure pursuant to section 552.110, and must be released to the requestor.

³We note that information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping "S" at the beginning.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 120528

Enclosures: Submitted documents

cc: Mr. William Rusteberg
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(w/o enclosures)

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(w/o enclosures)